IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.911 OF 2003

Shri Arvind P. Dicholkar)
Aged 48 years, Occ.Service,)
R/o.Khajurbhatwadi, Hatiskar)
Marg, Old Prabhadevi, Mumbai-26.)...Petitioner

Versus

1.The State of Maharashtra)
through the Secretary, Finance)
Department, Mantralaya,)
Mumbai-400 032.)
2.The Commissioner of Sales-tax)
Vikrikar Bhavan, Mazgaon,)
Mumbai-400 010.)..Respondents

Mr. M.V. Bandiwadekar, for the Petitioner
Mr.V.P. Malwankar, AGP for the respondents 1 and 2.

CORAM: F.I. REBELLO &
DR. D.Y.CHANDRACHUD, JJ.
DATE : 19th January,2006
ORAL JUDGMENT (PER F.I. REBELLO, J):

. The petitioner approached this Court against the order passed by Maharashtra Administrative Tribunal dated 4th February, 2002. The petitioner herein had been appointed as a Clerk on 6th November, 1976. He was confirmed in that past on 23rd March, 1984. The next promotional post for the petitioner was that of Sales-tax Inspector. For considering the petitioner to the promotional post, petitioner has to pass the departmental examination. Petitioner could appear for this departmental examination once he passed the examination for the post of Clerk which he appeared in March, 1993 and results were declared in June, 1993.

The petitioner was confirmed as a Clerk. The petitioner then appeared and passed the preliminary examination for the post of Sales-tax Inspector and was promoted to the said post on 29th September, 1993. The petitioner has also passed the Senior Examination consequent to which he could be confirmed in the post of Sales Tax Inspector. An order came to be issued on 21st January, 1996 by respondent No.2 reverting the petitioner to the post of Clerk as the petitioner had not passed the Departmental Examination within the prescribed chances and period.

. The petitioner aggrieved by this action filed O.A. During the pendency of the O.A. the petitioner's services were protected by way of interim relief. The O.A. was finally disposed of against which the petitioner preferred the present petition. Whilst admitting the petition the learned Division Bench of this Court was pleased to grant interim relief in terms of prayer clause (d)(ii), which read as under:-

> "the execution, operation and implementation of the impugned order of petitioner's reversion dated 31.1.1996 issued by Respondent No.2 be stayed and the petitioner be permitted to continue to work in the post of Sales Tax Inspector, with all consequential service benefits."

The order of reversion set out that in accordance with the amendment dated 2nd May, 1974 effected to Rule 5 of the Unified Post Recruitment Ministerial Sales Tax

Department Examination Rules, 1972, the petitioner along with 74 other employees had lost their seniority in the clerical cadre as they had not passed the clerical cadre Departmental Examination within the prescribed period of chances. It was further set out that the promotion of such clerks to the higher post posts, who have lost their seniority, is purely fortuitous and temporary and, therefore, considering their newly acquired seniority in the cadre of clerks, they are reverted to the post of clerk.

2. At this stage we may refer to O.A. 85 of 1996 and other O.As. which were disposed of by an order of the Tribunal dated 1st March, 1996. These were O.As. by other Sales Tax Inspectors who had also been reverted by the same order by which the petitioner herein was reverted. The learned Tribunal adverted to the Unified Post Recruitment Ministerial Sales Tax Department Examination Rules, 1972 as notified on 5th April, 1972 as also the amendment notified on 2nd May, 1974 whereby Rules 5 and 10 were amended and the subsequent notification of 10th March, 1993 whereby again Rule 5 was amended. The original Rules as well as amendment were made in the exercise of powers under Article 309 of the Constitution of India.

3. Rules 5 and 6 of the Unified Post Recruitment Ministerial Sales Tax Department Examination Rules,

1972 as it originally stood read as under:-

> "5. Subject to the provisions of rules 6 and 7 every such person appointed either as clerk or clerk-typist shall be required to undergo a course of training and to pass the examination prescribed according to the rules, within a period of five years from the date of his appointment, and within three chances.
>
> A candidate who fails to pass the examination within prescribed period of chances shall be liable to be discharged from service.
>
> 6. Persons who attain the age of 48 years and more on the date of these rules come into force should be exempted from the operation of these rules."

A reading of this Rule would make it clear, that in the event a candidate failed to pass examination within the prescribed period or chances such candidate shall be liable to be discharged from service. Rule 5 as amended by Notification dated 2nd May, 1974 which is relevant for our discussion reads as under:-

> "In rule 5 of the Unified Post Recruitment Ministerial Sales Tax Department Examination

Rules, 1972 (hereinafter referred to as the s;aid Rules), for the words "shall be liable to be discharged from service the words "shall lose his seniority and he will not be considered till he posses the examination" shall be substituted."

The second amendment to the Rules by Notification dated 10th March, 1993 reads as under:-

"The seniority of a candidate who fails to pass the examination within the prescribed period of chances, shall be counted from the next day of the last day of the examination which he will pass or from the day on which he shall stand exempted from passing the said examination."

4. The learned Tribunal on the consideration of the Rules rejected the contention urged on behalf of the applicant that even if in terms of the Rules as amended in 1974 they had lost their seniority on passing the examination for the post of clerk their seniority would be retained. The Tribunal noted that such a construction had been followed by the Department and that such a construction was not possible as a person who had failed to pass the examination would lose his seniority and the seniority would be liable to be fixed afresh on his passing the examination. The Tribunal

noted that this was clarified by the amendment of 10th March, 1993. So far as the petitioner is concerned the Tribunal noted that the last examination was held on 12th March, 1993 and as such the petitioner herein would not fall within the cut-off date 10th March, 1993 and consequently would not be entitled to the protection. The Tribunal noted that the applicant had not passed the examination within the chances and time prescribed and consequently chose not to interfere with the order.

5. The learned Counsel for the petitioner has advanced various arguments before us and also drawn our attention to the Rules framed under Article 309 of the Constitution of India. In answer to the petition the respondents have filed their reply. It is not necessary to advert to what is stated in the reply considering that the petition can be disposed off on the basis of the construction of the Rules themselves.

6. The petitioner was admittedly recruited and joined service after the amendment of 2nd May, 1974. Before the amendment to Rule, if the petitioner failed to pass the examination in the manner set out under the Recruitment Rules, he would be liable to be discharged. Consequent to the amendment he was entitled to be continued till he passes the examination but would lose his seniority. In other words though he would be

continued he would loose his seniority. It was sought to be contended on behalf of the petitioner by the learned Counsel placing reliance on how the Rule was understood by the Department that it only meant losing of seniority till such time as he passes the examination. We are unable to accept the contention as advanced on behalf of the petitioner by the learned Counsel. If such a construction is adopted that would result in denying those who passed examination earlier the right to be regularised before those who had not passed the examination. The regularisation depended on passing the examination unless there was any express rule to the contrary. Similarly seniority would be dependent on the Rules in force. As regularisation depended on passing the examination, it would be proper to hold that those who were regularised first would be senior to those who were regularised after the number of chances and attempt that were given under the rules. Therefore, those who passed the examination first would be entitled to be regularised earlier to those who had not passed the examination within the period and attempts and consequently the amendment of 10th March, 1993 is merely a clarification of the Rule as it stood by amendment of 2nd May, 1974. Once this construction is accepted the petitioner was not eligible to be considered for promotion as he could only be considered if he was in the zone of consideration. The petitioner admittedly was not in the zone of consideration.

Consequently the impugned order cannot be faulted.

7. Mr. Bandiwadekar has drawn our attention to the judgment in the case of Smt. V. Kameshwari vs. Union of India & Ors. 1993 AIR SCW 3559 to contend that his services could be protected. We have perused the case. We find that on the facts of that case the Apex Court clearly held that the Appellant before it was senior to respondent No.3 who had been promoted and consequently directed that the Appellant before it should be promoted from the date the respondent NO.3 had been promoted. The Apex Court also noted that in the meantime various examinations were held to which the respondent No.3 could have appeared for being considered for promotion and that he did not appear on account of the fact that he had already been promoted. In those circumstances the Apex Court directed that the services of the respondent NO.3 should also be protected. Those facts are clearly distinguishable and would not apply to the instant case where the candidate had to pass the examination within the period and attempts set out.

8. There are, however, some circumstances which are brought to our notice and to which we shall advert to. The petitioner appeared for the departmental examination in March, 1983, the results of which were declared in June, 1983. It is on account of passing of

this examination that his seniority was fixed from the last date of appearing for the examination which was on 12th March, 1993. These examinations were scheduled in December, but were postponed to March. It is because of this unfortunate circumstances that the petitioner's case would not fall within the cut-off date of 10th March, 1993 as set out by the Tribunal protecting those who had passed examination and were appointed on or before 10th March, 1993. In our opinion had the examinations been held in December, 1992 the petitioner's case also would have fallen within the cut-off date of 10th March, 1993. The petitioner otherwise has been working from 29th September, 1993 till date as a Sales Tax Inspector. The order of reversion was made on 21st September, 1996. Subsequently there have been interim orders in favour of the petitioner. Considering these peculiar facts and circumstances, though the petitioner had not passed the examination within the period contemplated, yet had the examinations been held in December, 1992 and the petitioner appeared and passed the examination he also could have been protected.

. It is in these circumstances that we direct the respondents to sympathetically consider the case of the petitioner to be continued in the post of Sales Tax Inspector without reverting him. The decision be taken at any rate within six months from today. In the event

for some reason the respondents do not regularise the petitioner's services, the petitioner having worked on the post of Sales Tax Inspector no recovery should be made from the petitioner on the ground that he was only entitled only to the salary as a Clerk from 21st January, 1996. With the above observations Rule discharged. There shall be no order as to costs.

(F.I.REBELLO, J.)

(DR. D.Y.CHANDRACHUD, J.)